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No. 468

In the

Supreme Court of the United States

OCTOBER TERM, 1959

THE ATLAS BUILDING PRODUCTS COMPANY,
Petitioner,

v.

DIAMOND BLOCK & GRAVEL COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner, The Atlas Building Products Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit entered in the above entitled cause on August 17, 1959.

OPINION BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at __ F. 2d __ (not yet reported), and is copied in Appendix A, *infra*, pp. 25-41.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was made and entered on August 17, 1959 (R. 23), and a copy thereof is appended to this petition in Appendix B; *infra*, p. 43. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

This is a suit for treble damages under 15 U. S. C., Section 13(a), being a portion of the Clayton Act as amended. Actual damages were alleged to be $200,000.00. There was a jury verdict for the plaintiff, with damages assessed at $10,000.00. Judgment was entered for plaintiff for treble that amount plus $8,000.00 attorney's fee, for a total sum of $38,000.00.

The questions presented are:

1. Whether the prohibitions of Section 2(a) of the amended Clayton Act are applicable to price differentials between different but non-competing purchasers of products of like grade and quality, where there is no evidence of sales below cost.

2. Whether a defendant-producer of products violates Section 2(a) of the amended Clayton Act by selling at lower prices in one market area than it does in another, where all of its sales in the lower priced area are for a fair profit and where the plaintiff-producer competing in the lower priced area operates at a profit for each year in question.

3. Whether a trial court in a private damage action under Section 2(a) of the amended Clayton Act in instructing the jury can require only a "reasonable possibility" of harmful effects from price discrimination or whether the proper instruction should use the phrase "reasonable probability".

4. Whether a plaintiff in a private treble damage action under Section 2(a) of the amended Clayton Act can recover damages where the evidence shows numerous causes for loss of business and loss of profits other than the activities of the defendant and the plaintiff fails to prove that any specific portion of his loss of business and profits were caused by the activities of defendant.

5. Whether a plaintiff in a private treble damage action under Section 2(a) of the amended Clayton Act can recover damages where the proof fails to contain any figures as to plaintiff's costs from which the jury might resaonably compute the amount of damages.

6. Whether Section 2(a) of the amended Clayton Act is constitutional under the Fifth Amendment to the Constitution of the United States when applied to a private treble damage action.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

The statutes and constitutional provisions involved are Section 2(a), of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C.,

Section 13(a), and the Fifth Amendment to the Constitution of the United States. They are set out in Appendix C, *infra*, p. 45.

STATEMENT

A complaint under the anti-trust laws of the United States was filed against The Atlas Building Products Company, a Delaware corporation, by Diamond Block & Gravel Company, a partnership of Las Cruces, New Mexico, on January 9, 1956 (R. 7-10). The jurisdiction of the Court was invoked under the following laws of the United States: Section 2(a) of the Clayton Act, 38 Stat. 730 as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. A. Section 13(a); Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A. Section 15. The Diamond Block & Gravel Company also alleged a violation of Section 3 of the Robinson-Patman Act, 49 Stat. 1528, 15 U. S. C. A. Section 13a, but this was eliminated as an issue in a pre-trial conference. The amount sued for was $200,000.00, with a prayer for treble damages and attorneys' fees.

Plaintiff-respondent, the Diamond Block & Gravel Company, hereinafter referred to as plaintiff, and the defendant-petitioner, The Atlas Building Products Company, hereinafter referred to as defendant, are manufacturers of lightweight aggregate building blocks. The plant of the defendant was constructed in El Paso, Texas, in 1946, and defendant sold its products in western Texas and southern New Mexico, including Dona Ana County, from that date to the present (R. 699). The plant of the plaintiff is located

in Las Cruces, New Mexico, the partners in plaintiff having purchased the plant in 1950 from F. A. Bunch who had previously been operating it (R. 139). The partners in plaintiff put approximately $10,500.00 of their own money into the business, having borrowed the rest (R. 140). At the time of this purchase, in additoin to Mr. Bunch and the defendant, Maynez Block Company of Las Cruces and Irving Block Company of Las Cruces were also selling lightweight aggregate blocks in Las Cruces and had been for a number of years (R. 257, 567, 699, 712). Plaintiff, Maynez and Irving sold their block only in Dona Ana County, New Mexico.

The trade areas of El Paso and Las Cruces are different trade areas insofar as the building business is concerned and purchasers of block for use in Dona Ana County do not compete with purchasers of block for use in El Paso County, Texas.

In the lightweight aggregate block business the standard block is a 8" x 8" x 16" regular block, and the prices in the trial were all limited to this size block, with the stipulation that the prices for other sized block were proportional and comparable (R. 8, 24). Any reference to an "equivalent" block is a reference to what the actual sized block would be if translated into the standard sized block.

During the period involved in this litigation, the plaintiff sold block to most dealers and contractors in Las Cruces at a price of 22.2¢ per block delivered from October, 1950 to May 1, 1953 and at a price of 23.1¢ per block delivered from that date to the end of September, 1957, the cutoff

date of this litigation (R. 168). However, in 1951, plaintiff sold to at least two large builders at a price of 21.74¢ (R. 151, 481), and in 1952 sold almost $3,000.00 worth of block in a month to one builder at a price of 20¢ (R. 118-189, 483) before the defendant ever sold a single block to that builder (R. 190, Ex. AD). Then in 1954 and later years, plaintiff bid a number of jobs at a price of 22.5¢ (R. 322-323, 200-201, 226-227).

From October, 1950, through 1951, defendant's sales in Dona Ana County were at an average price per equivalent of 24.5¢ delivered (R. 967). In 1952, defendant began to sell block to the builders of two large projects in Las Cruces, New Mexico, at a price of 20¢ per block delivered. This was done to meet the price quoted these builders by another block plant in Albuquerque, New Mexico. Thereafter, two dealers in Las Cruces, New Mexico, who stocked substantial amounts of block were given a price of 20¢ per block delivered, while all other dealers paid a price of 22.44¢ delivered. All other block sold in the Las Cruces area was sold at a price of 24.6¢ delivered, and over $160,000.00 worth of block was sold by defendant in this area at or above this price (R. 645-650, 704, 719). With regard o these jobs sold by defendant at a price of 24.6¢ or mo delivered, it should be noted that plaintiff was not able to handle some of these jobs as early as 1951 (R. 320). Thereafter, starting in September, 1954 and extending to April, 1955 plaintiff was often unable to bid because it was

remodelling (R. 223-228). From May through December of 1955, plaintiff had trouble with its cinder supply (R. 223), and from late in 1956 through 1957 plaintiff had transportation problems and hence refrained from attempting to obtain work where a satisfactory hauler was required (R. 232-233). That these continuing problems were not attributable to the defendant is shown by the fact that on twenty-nine separate occasions one of the partners in plaintiff admitted that the prices or pricing policies of the defendant had nothing to do with the plaintiff's failure to obtain the job involved.[1] In fact plaintiff failed to bid on thirty-seven separate jobs in the area in which plaintiff sold block. These were all jobs which defendant obtained at a price of 24.6¢ or higher per equivalent in the Las Cruces area, or 24.1¢ or higher in the Anthony area, which prices were as high or higher than plaintiff's prices. These jobs included school buildings, churches and business buildings, a majority of them being either school buildings or churches (See, *e.g.*, R. 198, 199, 202-203, 319, 320, 322).

There were also several school jobs which plaintiff did get at a price of either 22.5¢ or 23.1¢ on which it was unable to furnish a substantial part of the block required and which defendant eventually furnished at a price of 24.6¢.[2]

During the period involved, defendant sold a substantial number of block at White Sands Proving Ground at a price

[1] R. 199-200, 202, 203, 206, 214, 215, 224, 228, 229, 232, 236, 317, 319-326.

[2] R. 187-188, 201, 213-214, 227, 235-236, 460-461, 612-615, 728-729.

of 24¢, which price had been established in 1950 (R. 704-705), whereas plaintiff sold a couple of jobs at 23.7¢ and thereafter could neither produce sufficient block nor deliver to that base (R. 433, 443-444).

As to retail sales, it should be noted that plaintiff set up no dealer organization (R. 315) since it charged the same price to dealers as it did to contractors (R. 150). Defendant, on the other hand, did make an effort to create a dealer system (R. 702). Retail purchasers from plaintiff were able to buy at a price of 25.5¢ delivered (R. 150-151, 437), while dealers of defendant sold at prices ranging from 27¢ to 28¢ (R. 624, 629, 630). Moreover, these same dealers sold to contractors at prices ranging from 24¢ to 24.6¢ delivered (R. 624, 629, 630, 575), in contrast to plaintiff's prices of from 22.5¢ to 23.1¢ (R. 187, 195, 198-200, 728).

During this same period of time from October, 1950 to September, 1957, the El Paso delivered prices of defendant were 23.1¢ to dealers and from 19¢ to 23.1¢ to contractors (R. 618-619.)

Defendant's total cost of manufacturing an equivalent block during the period involved ranged from 10.157¢ to 12.5¢ a block and from 1.5¢ to 1.75¢ for overhead (R. 768, 770), such total costs ranging from 2.75¢ to 5.443¢ less than defendant's lowest plant price in sales to Dona Ana County of 17¢ (R. 712, 713, 764). Plaintiff was unable to produce any accurate cost figures for its operations (R. 248, 302, 303, 345).

From 1954 through the first nine months of 1957 plaintiff purchased $18,063.19 worth of block from other competing manufacturers, including defendant (R. 327).

During the period from January 1, 1951 to September 30, 1957 plaintiff produced 95,862 blocks more than it sold which apparently simply vanished (R. 308, 799, 803, 969). This large unexplained loss would have produced $17,000.00 additional profits to plaintiff at an average price of 20¢, after deducting normal breakage (R. 802).

Plaintiff made a profit in every year involved in this litigation, said profits being as follows: 1951, $18,103.66; 1952, $7,014.62; 1953, $7,835.68; 1954, $7,988.26; 1955, $9,429.55; 1956, $5,202.54; first nine months of 1957, $1,418.52 (R. 144-148).

The trial court denied defendant's motion for a directed verdict at the close of the plaintiff's case and at the close of all the evidence and submitted the case to the jury. The jury returned a verdict against the defendant and assessed the plaintiff's damages at $10,000.00. The trial court denied defendant's motions for judgment notwithstanding the verdict and for a new trial and entered judgment in favor of the plaintiff in the sum of $38,000.00. The United States Court of Appeals for the Tenth Circuit entered a judgment on August 17, 1959 sustaining the judgment rendered by the trial court.

REASONS FOR GRANTING THE WRIT

This case presents five different and compelling issues, each of which provides an excellent reason for a review by this Court of the decision below. These reasons are as follows:

1.

There is a conflict between the decision below and the decisions of the Courts of Appeals for the Seventh and Ninth Circuits on an extremely important question in the interpretation of Section 2(a) of the amended Clayton Act, *i.e.*, does the charging of different prices in different areas in sales to non-competing purchasers constitute price discrimination.

The court below stated the question: "Thus, we have squarely presented the question whether the prohibitions of Section 2(a) are applicable to price discrimination between different, but non-competing, purchasers of products of like grade and quality." In answering this question in the affirmative, the court in effect held that price differences between different geographical areas in sales to non-competing purchasers could constitute price discrimination even when the evidence showed that all sales in the lower priced area were made at a reasonable profit. The court expressly recognized in its opinion that its decision was in conflict with the decision of the Court of Appeals for

the Seventh Circuit in *Anheuser-Busch, Inc. v. Federal Trade Commission, 265 F. 2d 677 (7th Cir. 1959)*. It was said in the *Anheuser-Busch* case,

> "Price discrimination means more than a mere difference in price. There must be some relationship between the different purchasers which entitles them to comparable treatment. Inasmuch as the Commission admits that the prices charged in the St. Louis area, on the one hand, and in other areas, on the other hand, were different and that this difference is not the subject of its complaint, it is clear that the mere fact of difference in price resulting from difference of markets, is not price discrimination under the Act. * * * Where two purchasers from a seller are competing with each other, that competition creates a relationship that entitles them to comparable treatment as to price, without which treatment there would be a discrimination in price within the meaning of section 2(a). On the other hand, in a case like this, where the purchasers from a seller are located in different areas of the country and are not in competition with each other, there is generally no relationship which entitles them to be charged the same prices." *265 F. 2d at pp. 681-682.*

The court below said with respect to this holding in the *Anheuser-Busch* case,

> "We respectfully reject any such restriction upon Section 2(a)."

The decision in this case is also in conflict with the opinion of the Court of Appeals for the Ninth Circuit in *Balian Ice Cream Co. v. Arden Farms Co., 231 F. 2d 356, 366-368 (9th Cir. 1955), cert. denied, 350 U. S. 991, 100 L. Ed. 856 (1956)*, although the court below asserted that the cases

were distinguishable. The conflict is apparent from the statement in the *Balian* case where it is said:

> "It is obvious that Arden, by selling ice cream products in the Los Angeles area at a lower price than it charged for like products in other states, did not violate Sec. 2(a) of the Clayton Act, as amended, 15 U. S. C. A. Sec. 13(a). * * * The customers of Arden in the respective areas are not in competition with each other, and the products sold in each area are sold in competition with like products manufactured by others." *231 F. 2d at pp. 366-367.*

Thus if the court below had followed the above-cited decisions of the Seventh and Ninth Circuits, it would have held there was no discrimination by reason of different prices charged by defendant to customers in the Las Cruces, New Mexico, market area, as compared with prices to customers in the El Paso, Texas, market area, such customers not being in competition with each other. The court below not only refused so to hold, but sustained the action of the trial court, which, over defendant's objection, failed and refused to instruct the jury that in order for sales to different purchasers at different prices to be discriminatory, such purchasers must be competitors of each other. This was error for the reasons stated in the *Anheuser-Busch* and *Balian* opinions.

This question is of tremendous importance to every person selling in more than one market area, for under the Tenth Circuit's decision, every such person must sell in every market area at a uniform price or be subject to having a jury decide that he had unlawfully discriminated and assess damages against him. This decision unless cor-

rected could virtually destroy the American marketing system as we know it, a result certainly not contemplated by Congress. The court below even failed to state whether the uniform price was supposed to be a uniform mill net return or a uniform delivered price.

The court below also apparently failed to consider the fact that all of defendant's sales in the Las Cruces market were made at a reasonable net profit of from 16% to 32% of the lowest mill price received and the further fact that plaintiff made a profit each year before deducting the partners' drawings. This failure is demonstrated by the citation in the opinion below of *Moore v. Mead's Fine Bread, Inc., 348 U. S. 115, 99 L. Ed. 145 (1954)*, and *Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F. 2d 234 (2d Cir. 1929)*. After listing these cases, the court referred to "predatory price cutting which has the effect of eliminating or crippling a competitor." Further on, in connection with the trial court's instruction that the jury could consider defendant's size, economic power, and its comparative prices to purchasers in the Las Cruces and El Paso areas, the court said,

> "In this setting, it is fairly inferable that the appellant utilized its higher El Paso prices to stifle competition with its lower prices in the Las Cruces area. In other words that the appellant utilized its dominant market power *for predatory ends*." (Emphasis supplied.)

These references to "predatory price cutting", "stifling competition", and "predatory ends", together with the citation of the *Porto Rican Tobacco Company* case and the *Mead*

case clearly show the court below upheld the trial court's judgment partially on the basis referred to in the *Mead* case, wherein such type of pricing was described as financing the warfare by using profits made in interstate activities to underwrite the losses of local price-cutting campaigns. However, in both the *Mead* case and the *Porto Rican Tobacco Co.* case, the defendants sold at a loss for the purpose of driving a local competitor out of business. This was shown by the evidence not to be true in the instant case. As pointed out above, defendant's net profits on the lowest-priced Las Cruces sales were never less than 16% in the years with highest costs and ranged upward to 32% in the lowest cost years. Moreover, plaintiff was not driven out of business and made a profit each year before partners' withdrawals. Finally the net worth of the plaintiff's business increased from $10,500.00 in October, 1950, to $20,000.00 in September, 1957, when the business was transferred into a corporation (R. 140, 180). Thus the court below had no basis for classifying this case as a predatory price-cutting case and was in error in so doing.

2.

The court below, in affirming the instructions of the trial court that only a "reasonable possibility" of harmful effects need be shown to allow recovery (such phrase having been used in ten different places in the instructions), has created a conflict with the Second, Seventh, Eighth and Ninth Circuits as well as with the rulings of the Federal Trade Commission. The reason for the conflict is, as Mr.

Justice Whittaker so aptly stated in *Moog Industries, Inc. v. Federal Trade Commission, 238 F. 2d 43, 51 (8th Cir. 1956), affirmed 355 U. S. 411, 2 L. Ed. 2d 370 (1958),*

> "The proper test of injury to competition has been phrased in various ways."

The Supreme Court in *Standard Fashion Co. v. Magrane-Houston Co., 258 U. S. 346, 356, 66 L. ed. 653 (1922),* required that the effects be probable. In *Corn Products Refining Co. v. Federal Trade Commission, 324 U. S. 726, 738, 742, 89 L. ed. 1320 (1945),* this Court first used the word probability since it followed the *Standard Fashion* case, but then apparently inadvertently switched to the word possibility. Then in *Federal Trade Commission v. Morton Salt Co., 334 U. S. 37, 46, 92 L. ed. 1196 (1948),* this Court turned to the use of the word possibility, although this use was tempered by a footnote referring back to the use of the word "probability" in the *Corn Products* case and stating that the "possibility" language must be read in the light of the earlier statement in the *Corn Products* case that the term should be probability. Since the *Morton Salt* decision the following cases have reverted to the use of the word "probability" or at least have refused without qualification to espouse the word "possibility": *Minneapolis-Honeywell Reg. Co. v. Federal Trade Commission, 191 F. 2d 786, 792 (7th Cir. 1951), appeal dismissed, 344 U. S. 206, 97 L. ed. 245 (1952); Whitaker Cable Corporation v. Federal Trade Commission, 239 F. 2d 253 (7th Cir. 1956); E. Edelmann & Co. v. Federal Trade Commission, 239 F. 2d 152, 154 (7th Cir. 1956); Moog Industries, Inc. v. Federal Trade Commission, 238 F. 2d*

43, 51 (8th Cir. 1956), affirmed, 355 U. S. 411, 2 L. ed. 2d 370 (1958); Balian Ice Cream Co. v. Arden Farms Co., 231 F. 2d 356, 368 (9th Cir. 1955), cert. denied, 350 U. S. 991, 100 L. ed. 856 (1956); Standard Motor Products, Inc. v. Federal Trade Commission, 265 F. 2d 674, 676 (2nd Cir. 1959). The Federal Trade Commission in a policy statement issued after the *Morton Salt* case specifically required that a reasonable probability of harmful effects be shown. CCH, Trade Reg. Reports, par. 3601.35.

The importance of this question to the whole field of price discrimination litigation is obvious when it is considered that in every jury trial of a private treble damage suit alleging price discrimination the trial judge must instruct the jury on the question of harmful effects. Based on the decisions cited above, a trial judge in the Second, Seventh, Eighth, and Ninth Circuits would require a probability, a trial judge in the Tenth Circuit would require only a possibility, and the trial judges in the other circuits would be left to go in their uncertain way in attempting to determine which line of authority to follow. This is especially true since the Supreme Court declarations on this subject have always involved a review of evidence rather than a review of the wording of instructions. As has been carefully pointed out, there is a great difference in the permissible language which an appellate court may use in reviewing evidence and the permissible language which a trial court may use in instructing a jury. See *Union Traction Company of Indiana v. Berry, 188 Ind. 525, 124 N. E. 737, 738-739 (1919).*

The error of using the term "possibility" even for a review of the evidence is carefully spelled out in the dissent of Justices Jackson and Frankfurther in the *Morton Salt* case and need not be pursued further in this petition.

3.

The court below in stating that the facts were sufficient to support the verdict necessarily ruled that plaintiff had produced sufficient evidence that the illegal actions of defendant proximately caused plaintiff some damage. By this ruling in the light of undisputed facts that plaintiff failed to obtain business, lost profits and had financial problems for eleven different reasons, none of which were or could be attributed to defendant's pricing policies, including cinder supply problems, failure to know of jobs being bid, unexplained difference between the number of blocks produced and the number of blocks sold and inaccurate bookkeeping, the Tenth Circuit has created a conflict with the First, Eighth and Ninth Circuits. In each of those circuits the court has ruled as a matter of law, either by affirming a judgment n.o.v. for defendant or by reversing a jury verdict for plaintiff, that where there are a number of causes for loss and the plaintiff is unable to pinpoint the cause of all or any ascertainable part of his losses as being caused by the defendant's illegal activities, a verdict for plaintiff cannot stand. *Momand v. Universal Film Exchanges, Inc., 172 F. 2d 37 (1st Cir. 1948), cert. denied, 336 U. S. 967, 93 L. ed. 1118 (1949); American Can Company v. Russellville Canning Company, 191 F. 2d 38 (8th*

Cir. 1951); Flintkote Co. v. Lysfjord, 246 F. 2d 368 (9th Cir. 1957), cert. denied, 355 U. S. 835, 2 L. ed. 2d 46 (1957).

This Court said in *Story Parchment Co. v. Paterson Parchment Paper Co., 282 U. S. 555, 562, 75 L. ed. 544 (1931),*

> "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong * * *."

The rule itself is well established, and was recognized in the *Story Parchment Co.* case, although held inapplicable there.

In this case the court below held contrary to said rule, and its decision is necessarily in conflict with the above cited decisions from other circuits. The question is of the greatest importance to litigants in price discrimination cases, as it makes the difference between permitting a jury to assess only damages which are shown to result from price discrimination, or permitting it to assess damages which may equally well have resulted from one or more other, and unrelated, causes. In order that there may be an authoritative and uniform ruling on the question, this petition should be granted, and the question should now be settled by this Court.

4.

In sustaining the judgment of the trial court, the court below denied appellant's attack on the verdict made on the grounds that the plaintiff had not produced any evidence

as to the amount of his damages. In so doing the court created a conflict with the Second, Seventh and Ninth Circuits. See *Baush Machine Tool Co. v. Aluminum Company of America, 79 F. 2d 217 (2nd Cir. 1935); Enterprise Industries v. Texas Company, 240 F. 2d 457, 458-459 (2nd Cir. 1957), cert. denied, 353 U. S. 965, 1 L. ed. 2d 914 (1957); Emich Motors Corp. v. General Motors Corp., 181 F. 2d 70 (7th Cir. 1950), reversed on other grounds, 340 U. S. 558, 95 L. ed. 534 (1951); Fargo Glass & Paint Co. v. Globe American Corp., 201 F. 2d 534, 540-541 (7th Cir. 1953); Wolfe v. National Lead Company, 225 F. 2d 427 (9th Cir. 1955), cert. denied, 350 U. S. 915, 100 L. ed. 802 (1955).* In each of these cases the Circuit Court held as a matter of law that the jury must have figures with which reasonably to compute the amount of damages. In the instant case, in addition to a general failure to prove the extent of damages, the plaintiff additionally failed completely to produce any accurate cost figures (R. 345), and clearly in a suit involving a manufacturing business, accurate costs are vital in any computation of profits or lost profits. *Wolfe v. National Lead Company, supra.* The court below in failing to recognize this, and in failing to follow the Second, Seventh and Ninth Circuits, was thus clearly in error.

The importance of this issue is manifest. Plaintiffs in this type of case should be informed by this Court whether they must produce accurate figures from which the jury can compute damages or whether they may free-wheel as though the case were a personal injury case, as the plain-

tiff did in the instant case. Moreover, the defendants in such cases should be advised whether they will be able to defend themselves on the question of damages by showing plaintiffs" figures to be erroneous, or whether they are defenseless and subject only to the whims of the jury. The instant case presents an excellent vehicle for this court to clarify this important issue. We submit that upon a review of this case this Court will conclude that the court below was clearly erroneous in allowing the jury to speculate as to the amount of damages with no accurate figures before them.

5.

In pointing out to the court below that Section 2(a) of the amended Clayton Act was unconstitutional, appellant posed to the court four specific questions as to pricing in the Las Cruces area which simply could not be answered by referring to the statute in question. This demonstration that the statute was so vague, uncertain and indefinite as to violate the Fifth Amendment to the Constitution of the United States by failing to set up reasonably certain and ascertainable standards was lightly disposed of in the decision below by the statement that the language of Section 2(a) was no less vague than the language in the first two sections of the Sherman Act *(15 U. S. C. A., Secs. 1 and 2)*. However, the fact is that neither courts nor writers have had any substantial difficulty in applying the language of the Sherman Act, while the opposite is true of Section 2(a). The Second Circuit in *Ruberoid Co. v. Federal*

Trade Commission, 189 F. 2d 893, 894-895 (2d Cir. 1951), said that the trouble with the Federal Trade Commission order entered therein was the Act itself "which is vague and general in its wording and which cannot be translated with assurance into any detailed set of guiding yardsticks." Mr. Justice Jackson in his dissenting opinion to the affirmance by this Court of the *Ruberoid* case, *343 U. S. 470, 483-484, 96 L. ed. 1081 (1952),* said,

> "This section of the Act admittedly is complicated and vague in itself and even more so in its context. Indeed, the Court of Appeals seems to have thought it almost beyond understanding."

The court in *United States v. New York Great Atlantic & Pacific Tea Company, Inc., 67 F. Supp. 626, 676 (E. D. Ill. 1946), affirmed, 173 F. 2d 79 (7th Cir. 1949),* stated:

> "Sometimes I doubt whether we ever needed the Robinson-Patman law, with all its elusive uncertainty."

See also *Simon, Geographic Pricing Policies (Callaghan & Co. 1950), pp. 263-264; Section of Anti-Trust Law, American Bar Association, An Anti-Trust Handbook (1958), p. 38; Southwestern Legal Foundation, 1958 Institute on Anti-Trust Laws, p. 1.*

This court has consistently held that statutes of a penal nature must define the prohibited offense with sufficient certainty so that anyone may know from the language what acts will transgress the statute. *International Harvester Co. v. Commonwealth of Kentucky, 234 U. S. 216, 58 L. Ed. 1284 (1914); United States v. Cohen Grocery Company, 255 U. S. 81, 65 L. Ed. 516 (1921); Connally v. General Construction Company, 269 U. S. 385, 70 L. Ed. 322 (1926);*

Cline v. Frink Dairy Company, 274 U. S. 445, 71 L. Ed. 1146 (1927). We submit that Section 2(a) is much like that article of the Chinese Penal Code quoted by Judge Brewer in *Railway Co. v. Dey, 35 Fed. 866, 876 (Circuit Ct. Iowa 1888)*, as follows:

> "Whoever is guilty of improper conduct, and of such as is contrary to the spirit of the laws, though not a breach of any specific part of it, shall be punished by at least forty blows; and when the impropriety is of a serious nature, by eighty blows."

As Mr. Justice Jackson pointed out in his dissent in the *Ruberoid* case, *supra*, it is true that the Federal Trade Commission can fill in the gap in the legislation and, in effect act as a type of secondary legislature. In private treble damage actions, however, the secondary legislation is lacking and all the vagueness and uncertainty of the Act could well innocently trap a defendant into suffering a verdict of hundreds of thousands of dollars. This is certainly not a result contemplated by our founding fathers when they adopted the Fifth Amendment.

The importance of this question to treble damage litigants in price discrimination cases is enormous. A partial list of treble damage verdicts is contained in *Comment, Antitrust Enforcement by Private Parties, Analysis of Developments in the Treble Damage Suit, 61 Yale L. J. 1010, 1043-1055;* see also *Toulmin, Anti Trust Laws of the United States, Vol. 6, Section 27.26.* This list indicates both the large number of suits brought under Section 2(a), and the large damages that sometimes are assessed against a defendant.

Where the statute furnishes no standard of conduct by which a citizen can measure his actions to see if they are legal or illegal, since he only knows, if he reads the anti-trust literature, that he is required by the Sherman Act to engage in "hard" competition, and by the Clayton Act, as amended by the Robinson-Patman Act, to engage in "soft" competition; and where the same statute furnishes no standard of conduct by which a jury trying a price discrimination case under Section 2(a) can measure the defendant's conduct so that it can determine on any definite, legal basis, as distinguished from sympathy, prejudice or whim, whether defendant has violated the law, then that statute is certainly too vague, uncertain and indefinite to be valid under the due process clause of the Fifth Amendment. The large number of private damage suits brought under Section 2(a) demonstrate the importance of the question, and we submit this Court should grant this petition, and hold Section 2(a) invalid. Congress could then pass a clear statute which will allow the business people of this country to know what they can and cannot do in the field of pricing without having constantly to guess at their peril as they presently are required to do under this unconstitutional Act.

CONCLUSION

Numerous important questions as to the interpretation of Section 2(a) of the amended Clayton Act are raised by this case. The issues are clearly presented in the facts and in the instructions of the trial court to the jury. The deci-

sion of the court below is in many respects in clear conflict with the decisions of other Circuits. Thus this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October, 1959

APPENDIX A

United States Court of Appeals

TENTH CIRCUIT

May Term—1959

No. 5990

THE ATLAS BUILDING PRODUCTS COMPANY,
Appellant,

v.

DIAMOND BLOCK & GRAVEL COMPANY,
Appellee.

Appeal From the United States District Court for the District of New Mexico

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August 17, 1959

Before MURRAH, PICKETT and BREITENSTEIN, Circuit Judges.

MURRAH, Circuit Judge.

This is an appeal from a judgment for triple damages in a private antitrust suit, laid under Section 2(a)[1] of the Clayton Act, as amended by the Robinson-Patman Act, 49 Stat. 1536, 15 U. S. C. A. 13(a).

The allegations are that the plaintiff-appellee, Diamond Block & Gravel Company, is a manufacturer and seller of cinder concrete building blocks to the building trade in Las Cruces, New Mexico and vicinity; that the defendant-appellant, Atlas Building Products Company, manufactures and sells the same products in El Paso, Texas and vicinity, where it has a virtual monopoly; and that it also sells those products to the building trade in Las Cruces and vicinity. The crux of the charge is that commencing in 1950, and continuing to the filing of this suit, the defendant has systematically sold its products in Las Cruces at prices actually lower than its comparable El Paso sales; that it employed its highest El Paso prices to finance its price war against competitors in New Mexico, including the plaintiff; that such practices constitute price discriminations between different purchasers, the effect of which may be to lessen competition or tend to create a monopoly in commerce in building blocks, or to injure, destroy or prevent competition by the plaintiff with the defendant, and with persons who received the benefit of such discriminations,

[1] "It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them * * *."

or with customers of either of them. The appellee then alleged that as a result of the acts complained of, it had been injured in its business in the sum of $200,000.00, for which it prayed judgment, to be tripled as required by law, and for reasonable attorney fees.

The appellant moved to dismiss the complaint for failure to state a claim upon which relief could be granted under Section 2(a), and upon denial pleaded, first, that its pricing policies were not discriminatory, but if so, they were made in good faith to meet an equally low price of a competitor within the meaning of Section 2(b), 15 USCA 13(b)[2]. The case was submitted to the jury on the theory that the burden was upon the plaintiff to show by a preponderance of the evidence that the defendant did in the course of commerce, directly or indirectly, discriminate in price between different purchasers of concrete cinder building blocks of like grade and quality; that price discrimination in the statutory sense means the giving to one of the purchasers an advantage in price not accorded or given to other purchasers. The jury was specifically told that a price discrimination as thus defined was not alone sufficient to sustain a claim under Section 2(a), for to be actionable, the evidence must show a "reasonable possibility" of a substantial lessening of competition or tendency to create a monopoly, or injure, destroy or prevent competition with

[2]Section 2(b) pertinently provides:

"That nothing contained in sections 12, 13, 14-21, and 22-27 of this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

any person who grants or receives the benefit of such discrimination. Thus, the jury was instructed that "a price discrimination may exist if a seller exacts different prices from its customers * * * where one leg of the price differential is across state lines and this differential affects or has a tendency to affect competition in the ways I have mentioned"; and that "the jury has the right to consider any difference in prices charged in El Paso, Texas on the one hand, and prices exacted by it [defendant] in Dona Ana County, New Mexico [Las Cruces] on the other."

The defendant objected to all of these instructions and to refusal of the court to instruct the jury that to be actionable under Section 2(a), the price discrimination must be between different purchasers in direct competition with each other; and that the court therefore erroneously permitted the jury to consider the difference in the defendant's prices in El Paso on the one hand, and Las Cruces on the other.

Thus, we have squarely presented the question whether the prohibitions of Section 2(a) are applicable to price discriminations between different, but noncompeting, purchasers of products of like grade and quality. The appellant takes the position that geographic price differentials or discriminations between noncompeting purchasers in different localities are not actionable under Section 2(a), but only under Section 3 of the Robinson-Patman Act, for which a private cause of action under Section 4 admittedly does not lie. And see Nashville Milk Co. v. Carnation Co.,

355 U. S. 373; and Safeway Stores, Inc. v. Vance, 355 U. S. 389.

In the first place, there is nothing in the statute to indicate that its prohibitions are restricted to price discriminations between competing purchasers in the same area. The statute is not couched in terms of locality. See Corn Products Co. v. Federal Trade Commission, 324 U. S. 726, 734. The purpose of this Section as an integral part of the antitrust legislative scheme is to prevent price discriminations in commerce which tend to injure competitive enterprise. To that end, it forbids a seller from charging different customers different prices for the same products with the effect of lessening competition. And, we know that market power is a ready means toward competitive injury. See Sen. Rep. 1502, 74th Cong., 2 Sess., 4 (1936); H. R. Rep. 2287, 74th Cong., 2 Sess., 8 (1936); 80 Cong. Rec. 9417 (1936). Furthermore, geographic price discrimination between noncompeting purchasers was asserted and sustained under both Sections 2(a) and 3 in Moore v. Mead's Fine Bread, 348 U. S. 115. Indeed, the court pointed out that such practices were prohibited under the Clayton Act even before the Robinson-Patman Amendment, citing Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F. 2d 237. The court was sure that "Congress by the Clayton Act and the Robinson-Patman Act barred the use of interstate business to destroy local business, outlawing the price cutting employed by respondent." It went on to quote from a statement of Congressman Utterback, one of the Managers of the Robinson-Patman Amendment, that

"Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other * * *." And see also Maryland Baking Co. v. Federal Trade Commission, 243 F. 2d 716.

It is agreed that Section 2(a) of the Clayton Act and Section 3 of the Robinson-Patman Act "overlap in some respects", but are in no way inconsistent with each other. Section 2(a) provides a civil remedy by way of triple damages, while Section 3 imposes criminal penalties for some but not all of the same infractions. Section 3 is specific in its interdictions of geographic price discriminations, while Section 2(a) is broader to prohibit the same practices between different purchasers wherever located, whether competing or not, when the effect of such discrimination may substantially lessen competition or tend to create a monopoly in any line of commerce. Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise. But as a necessary incident thereto, it is concerned with predatory price cutting which has the effect of eliminating or crippling a competitor. For, surely there is no more effective means of lessening competition or creating monopolies than the debilitation of a competitor.

Our case is clearly distinguishable from suits by a local purchaser against a manufacturer, where competition between purchasers is of course essential to actionable price discrimination. See Naifeh v. Ronson Art Metal Works, 117

F. Supp. 690, affmd, 218 F. 2d 202; Klein v. Lionel Corp., 237 F. 2d 13; Shaw's, Inc. v. Wilson-Jones Co., 105 F. 2d 331. Our case is also, we think, distinguishable on facts from Balian Ice Cream Co. v. Arden Farms Co., 231 F. 2d 356, in which, while the interstate manufacturer discriminated in price between different purchasers in distant localities, the difference in the price was held not to substantially lessen competition or tend to create a monopoly in the product sold. In short, the conclusive finding of the trial court negated the existence of any prohibited consequences or the possibility thereof.

The same legal issue was before the Seventh Circuit in Anheuser-Busch, Inc. v. Federal Trade Commission, 265 F. 2d 677, where the court was presented with the basic question whether uniform local price cuts by an interstate manufacturer which disrupted the market to the injury of local competitors, were price discriminations within the proscription of Section 2(a). The court held that even though directed at local competitors, the price cuts were not discriminatory, apparently because they did not discriminate among local competitors. This conclusion is apparently based upon the theory contended for here that the statutory words "different purchasers" means competing purchasers. We respectfully reject any such restriction upon Section 2(a). For, we are convinced that geographic price discriminations employed for predatory ends are cognizable under either Section 2(a) or Section 3, and it was therefore not error for the court to tell the jury that they might consider differences in price in El Paso County,

Texas, and Dona Ana County, New Mexico, in determining whether the defendant was guilty of actionable price discrimination.

As thus construed and applied, the appellant says that the statute is so vague and indefinite as to be incapable of observance in circumspect human conduct, and is therefore fatally defective for want of due process. But we do not think the generalized language of Section 2(a) is any less definite and certain in the standards of conduct it proscribes than the restraint of trade and monopolization provisions of Sections 1 and 2 of the Sherman Act, the criminal sanctions of which have long since been sustained as against the claim of unconstitutional vagueness. See Nash v. United States, 229 U. S. 373. "The law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." Id. p. 377. Other related provisions of the antitrust laws of equally vague import have withstood the constitutional test. See F. & A. Ice Cream Co. v. Arden Farms, 98 F. Supp. 80; Elizabeth Arden, Inc. v. Federal Trade Commission, 156 F. 2d 132.

This brings us to the sufficiency of the facts to sustain the charge, and we think they are adequate.

It seems to be agreed that the appellant's prevailing El Paso prices to dealers and contractors during the period in question were 24¢ per standard block, less 10 per cent, plus 1½¢ delivery charge, or a delivered price of 23.1¢. And, there was evidence from which the jury was justified in finding that during the same period, the appellant's Las

Cruces delivered price was 20¢, including a 3¢ haulage charge. There were variations in the prices to dealers and contractors, but the 20¢ delivered price was generally applicable to the principal building contractors. There was evidence to the effect that from the early part of 1952, when the appellee commenced business, it sold cinder blocks of the same grade and quality to the building trade for 23¢ per block, less 10 per cent, plus 1½¢ haulage, or a net of 22.2¢ delivered price; that in some instances it gave a 12 per cent discount to large contractors, or a net of 21.74¢; that in May 1953, the price was changed to 24¢, less 10 per cent, plus 1½¢ haulage, or a net of 23.1¢ delivered price. There was testimony to the effect that in April or May 1952, the contractors who had been purchasing blocks from appellee at the foregoing prices inquired whether it could meet a 20¢ delivered price; that thereafter appellee did sell blocks for two or three houses to one principal builder for 20¢ delivered price, but was forced to discontinue sales at this price; that this builder and other builders thereupon ceased to purchase blocks from appellee and thereafter purchased all of their blocks from the appellant.

The appellant points to the fact that it sold much of its blocks through its dealers in Las Cruces and vicinity, and that those dealers sold blocks retail always in excess of 24¢, and sometimes as much as 27¢; that the appellee was actually in competition with appellant's dealers, between which there was no price discrimination; that the appellee was unable to compete for the contractors' trade because of its inability to supply their requirements due to lack of

plant facilities and raw materials, production problems, failure to make special types of block needed in the building industry, wasteful increase in production costs, lack of sales organization, failure to maintain sufficient inventory, and other economic factors disabling the appellee from supplying the market demand in its trade area.

There was evidence that during the prosecution period, the appellant sold $162,000.00 worth of blocks in the Las Cruces area for prices in excess of 24.1¢, but the evidence also showed without much dispute that during the same period, it sold $603,163.00 worth of blocks at prices lower than 24.1¢ in the same area. From this it is reasonable to say, as did the jury, that the appellant discriminated in prices between its purchasers in El Paso and its purchasers of the same class in the Las Cruces area.

As we have seen, the jury was emphatically told that only price discriminations resulting in proscribed harmful effects were actionable. But the jury was also told, rightly we think, that in determining the presence or absence of the harmful effects, if any, it could consider the size of the appellant and its economic power in the area in which it operates, the amount of blocks sold by appellant as compared to the amount sold by appellee, and the comparative prices at the consumer level, that is, the level of contractor and retail sales; and that they should take into consideration the reasons given by purchasers for purchasing appellant's or appellee's blocks. In that connection, however, the jury was advised that the antitrust laws were never intended as an "instrument to stifle or prevent competition,

or as a means to create monopolies." That, "While its primary purpose was to give some measure of protection to the small business, as against unlawful practices by strong and powerful competitors, it does not exclude or preclude the large business from entering into any field and competing legitimately with others engaged in a like business enterprise." Thus, the jury was told that if the appellee failed to prove by a preponderance of the evidence that the price discriminations, if any, had reasonably possible harmful effects as outlined in the statute, the verdict must be for the appellant.

There was testimony that the appellant's 20¢ delivered price to the principal contractors deprived the appellee of its "bread-and-butter" business and prevented it from enlarging its plant facilities to take care of the demand, or to pursue a vigorous sales policy. There was evidence that in a healthy market the appellee could have enlarged its plant within a short time to enable it to compete for the business of the principal contractors in this particular area.

It is significant, we think, that the appellant was the largest manufacturer and supplier of cinder concrete blocks in this territory. It enjoyed a virtual monopoly in El Paso County, and possessed the dominant market power in nearby counties in New Mexico, including Dona Ana County. In this setting, it is fairly inferable that the appellant utilized its higher El Paso prices to stifle competition with its lower prices in the Las Cruces area. In other words, that the appellant utilized its dominant market

power for predatory ends. It was not error, therefore, for the trial court to instruct the jury that in determining the tendency of the price discriminations to substantially lessen competition and create a monopoly, they could consider the size of the appellant, its economic power and its comparative prices to purchasers in the El Paso and Las Cruces areas. Cf. Moore v. Mead's Fine Bread, supra; United States v. Griffith, 334 U. S. 100.

In defense of its pricing policy, appellant refers to a sale of pumice blocks by a competitor, not the appellee, for 20¢ delivered price, and indicates that its 20¢ delivered price was made to meet an equally low price of a competitor. But the evidence shows that the 20¢ delivered price was an isolated sale and arose through a misunderstanding between the purchaser and the supplier. In any event, the jury was told that even though they believed by a preponderance of the evidence that the appellant did discriminate in price, if they were satisfied by the same preponderance of the evidence that such discrimination was in good faith and only to meet an equally low price of a competitor, their verdict should be for the appellant, so long as the price reduction was not below the competitor's low price. And see Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231. We think these instructions, considered together, correctly state the antitrust law applicable to these facts.

As we have seen, the jury was positively instructed that appellant's price discriminations, if any, were actionable if there was a "reasonable possibility" of a substantial lessening in competition or tendency to create a monopoly. The

appellant objected to the use of the words "reasonable possibility", insisting that the court should have required a showing of a "reasonable probability" of the proscribed effect on commerce.

The use of both phrases to mean the same thing in Corn Products Co. v. Federal Trade Commission, supra, has provoked considerable discussion concerning the authoritative choice of the two to define the statutory phrase "may be to substantially lessen competition * * *" which, in our judgment, needs no definition. Federal Trade Commission v. Morton Salt Co., 334 U. S. 37; E. Edelmann & Co. v. Federal Trade Commission, 339 F. 2d 152; Whitaker Cable Corp. v. Federal Trade Commission, 239 F. 2d 253; Moog Industries v. Federal Trade Commission, 238 F. 2d 43. But whatever may be said for the use of the words "reasonable probability" as a basis for judicial action (see Mr. Justice Jackson dissenting in Federal Trade Commission v. Morton Salt Co., supra), the fact remains that for good or bad, the Supreme Court has deliberately adopted "reasonable possibility" over the more positive "reasonable probability" to indicate the required quantum of proof to show the prohibited harm. Federal Trade Commission v. Morton Salt Co., supra.

While the court did tell the jury that reasonable possibility of harmful results was sufficient, it did emphasize that such harm must not be "imaginary or illusive". We cannot say that the trial court erroneously used the phrase "reasonable possibility" instead of "reasonable probability."

The appellant also complains of the refusal of the trial court to give its requested instructions on proximate cause. But the jury was told clearly and unmistakably that even though it should find that the appellant's pricing policies amounted to actionable price discrimination, the burden was on the appellee to establish by a preponderance of the evidence that the losses, if any, were proximately caused by such price discriminations; that loss of business occasioned by inability to achieve or maintain an adequate inventory, inability to deliver its products to purchasers, by shut downs in its plant, failure of material and supplies, or failure to bid on business or solicit purchases, could not be attributable to the appellant's pricing policies; and if, therefore, the jury found that the loss of business was caused by any of these factors or by legitimate competition, their verdict should be for the defendant. The jury was instructed in language too clear for doubt that there must be a causal connection between the losses sustained, if any, and the unlawful acts of the appellant. Under these instructions we think the question of proximate cause was properly submitted to the jury. And see Story Parchment Co. v. Paterson Co., 282 U. S. 555.

The ascertainment of requisite damages to the appellee's business and property was submitted to the jury on the theory that it was incumbent on the appellee to prove such damages with reasonable certainty, not by guess and conjecture. But, "If the damage is certain, the fact that its extent is uncertain does not prevent a recovery." Story Parchment Co. v. Paterson Co., supra. See also Kobe, Inc.

v. Dempsey Pump Co., 198 F. 2d 416; Leader Clothing Co. v. Fidelity & Casualty Co. of N. Y., 237 F. 2d 7; Wells Truckways v. Burch, 247 F. 2d 194; Bigelow v. R.K.O. Radio Pictures, 327 U.S. 251.

On the question of damages and the amount thereof, the appellee relied on the testimony of one of its partners, who produced the records of the Company on sales and cost of production, and who also testified concerning the appellee's sales policies in the Las Cruces area in its attempts to compete with the appellant. Generally, the testimony reflected an increased cost of production commensurate with decreased production resulting from diminished sales. A public accountant analyzed the appellee's production cost and computed the amount of business the appellee might reasonably be expected to receive if El Paso prices (i.e. 21.6¢ f.o.b.) had prevailed, and from that projected the appellee's profits but for the price discrimination. A manufacturer's agent, familiar with the block building business, and particularly the production methods and procedures prevalent in the business, testified that the appellee could have expeditiously enlarged its production facilities to meet the demand and compete for its fair share of the business in a flourishing market. The accounting procedures employed by the appellee to show damages were not as satisfactory as the trial court thought they should have been, but that they were sufficient. We agree that the evidence tended to show that as a result of the appellant's pricing policies, the appellee had been deprived of business which it would have reasonably been expected to obtain under prices

generally prevailing in the El Paso area; and that as a result of the loss of this business, its profits dwindled, its cost of production increased, and the value of its business was diminished.

In that regard the jury was instructed that in determining damages it might consider as one of the elements, any profits that may have been lost by appellee in its business; and that it might also consider as another element of damages the extent to which the value of appellee's profit or the net worth of its assets had been diminished as a result of the price discrimination. The appellant objected to this instruction on the ground that it permitted the jury to assess double damages for one wrongful act.

The statute speaks of injury to "business or property". And, see Section 4 of the Clayton Act, 38 Stat. 731, 15 U. S. C. A. 15.[1] And, those words in their ordinary sense have been construed in terms of (1) the difference, if any, between the amounts actually realized by the injured party and what it would have reasonably expected to realize from sales but for the unlawful acts complained of; and (2) the extent to which the value of the petitioner's property had been disminished as a result of such acts. See Story Parchment Co. v. Paterson, supra; Kobe, Inc. v. Dempsey Pump Co., supra; Bigelow v. R. K. O. Pictures, supra. We think both loss of profits in business and diminishment of the assets were proper elements of damage, and the trial court did not err in so submitting the case to the jury.

[1] Section 4 provides in material part: "Any person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor * * *."

The appellant also challenges the testimony of the accountant and the manufacturing agent as wholly outside the scope of the case and the knowledge of the witnesses, and as based upon hypothetical facts having no basis in the evidence and contrary thereto. Much of the accountant's testimony was of doubtful relevance, and the court excluded parts and confined other parts within narrow range. We think in the last analysis the weight and probative value of the testimony they gave concerning the amount of damages was for the jury under instructions of the court.

As the trial court observed, the jury award of $10,000.00 was "very moderate" under the proof of the amount of sales and the worth of the business involved. We have recently restated the general rule that "on a motion for directed verdict upon the ground of the insufficiency of the evidence to take the case to the jury on the crucial issue or issues of fact, the evidence and the inferences fairly to be drawn from the evidence must be considered in the light most favorable to the party against whom the motion is directed. And if the evidence and the inferences fairly drawn therefrom—viewed in that manner—are such that reasonable minded persons in the exercise of fair and impartial judgment may reach different conclusions upon the crucial issue or issues of fact, the motion should be denied and the question submitted to the jury." Transcontinental Bus System, Inc. v. Taylor, 265 F. 2d 913. See also Linn v. Ula Uranium, Inc., 265 F. 2d 916; Story Parchment Co. v. Paterson, supra. We agree with the trial court that the evidence, considered in its entirety, is sufficient to support the judgment of the court, and it is affirmed.

APPENDIX B

JUDGMENT

Fifty-third Day, May Term, Monday, August 17th, 1959.

Before Honorable Alfred P. Murrah, Chief Judge, and Honorable John C. Pickett and Honorable Jean S. Breitenstein, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the District of New Mexico and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said district court in this cause be and the same is hereby affirmed.

APPENDIX C

Section 2(a) of the Clayton Act, 38 Stat. 730, as amended by the Robinson-Patman Act, 49 Stat. 1526, 15 U. S. C. 13(a), provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: * * *.

The Fifth Amendment to the Constitution of the United States provides in pertinent part:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

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NOV 12 1959
JAMES R. BROWNING, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 468

THE ATLAS BUILDING PRODUCTS COMPANY,
Petitioner,

v.

DIAMOND BLOCK & GRAVEL COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement of the Case

Throughout its Statement (Pet. pp. 4-9), petitioner The Atlas Building Products Co. (hereinafter usually called Atlas) has omitted or distorted important facts necessarily found against it by the jury under the trial court's instructions. To chase down and scotch each misstatement would be like trying to gather wind-scattered feathers and put them back in a pillow, and would take much more space than the original statements. We will confine ourselves to the more important, referring the Court respectfully to the Tenth Circuit's statement of the facts as

being fair and impartial. It should be noted that Atlas has not attacked the facts as stated by the Tenth Circuit in any particular.

Atlas fails to mention that during the period involved in this action (January 1, 1958-August 8, 1957) it sold $603,163.10 worth of cinder concrete building blocks in Dona Ana County, New Mexico, at prices which were prima facie discriminatory (less than 24.6¢ or El Paso price plus transportation), and these sales amounted to four-fifths of its business in that county. (R. 374). Atlas would gloss over this by talking (Pet. p. 6) about the $160,000 worth of block it sold there at non-discriminatory prices, mainly on jobs which it knew the respondent, Diamond Block & Gravel Co, (hereinafter usually called Diamond), could not handle. Atlas seems oblivious to the fact that it thereby admits discriminating among its customers in Dona Ana County! Atlas also likes to talk about prices exacted at retail by its dealers *vis a vis* Diamond's retail prices, and about prices of the parties in 1950 and 1951 before the period involved in this suit, all of which is irrelevant.

Atlas fails to mention that it had over 99% of the block business in El Paso County, Texas, where its plant was located and where it had only one tiny "competitor" who manufactured a different type of block (R. 667, 668, 35, 42-44), and that its sales manager admitted its prices there might be lower if it had to compete (R. 668).

Atlas fails to mention that in El Paso, where it thus had a virtual monopoly, its uniform price to all dealers was 21.6¢ f.o.b. plant or 23.1¢ delivered, that it exacted the same prices from more than 50 contractors there while favoring three with lower prices (R. 618, 671, 687), and that at the same time it was selling block to the large dealers and contractors in Las Cruces, 45 miles away and where

it had competition, at 17¢ f.o.b. plant or 20¢ delivered. Atlas fails to mention that it took the two largest home builders away from Diamond with this 20¢ price (R. 473-478, 542, 543). Although Atlas never pleaded or attempted to prove that it cut prices to meet Diamond's, it claims that Diamond offered the 20¢ price first. Diamond did for a short time attempt to meet *Atlas'* 20¢ price, but did not cut first (R. 153, 155, 156, 490, 504).

Atlas pleaded and attempted to prove that it cut to 20¢ to meet the price of an Albuquerque manufacturer who sold two truckloads of *pumice* block in Las Cruces early in 1952 and went out of business in 1953, while Atlas continued this price until the time of trial and extended it to other customers. There is some doubt that the Albuquerque competitor's price was 20¢, but in any event the jury's verdict disposed of this defense and necessarily decided the fact against Atlas. (R. 474, 488, 489, 545, 659, 660)

Atlas would convey the impression that the El Paso and Las Cruces market areas are entirely separate. The fact is that they are adjacent and overlapping, with both dealers and contractors operating to some extent across the artificial demarcation line. (R. 730, 732, 667). In fact, Atlas contended at the trial that El Paso and Las Cruces constituted *one market area* (R. 81, 83, 84).

Diamond objects to Atlas' statement that Diamond could not have taken care of additional business. The uncontroverted evidence shows that it could easily have expanded its production and would have done so but for Atlas' price warfare, which took away the steady, house-a-day, "bread and butter" business which would have made such expansion feasible. (R. 70, 120, 152-156, 194, 195, 494).

Atlas claims it never sold below cost in Las Cruces. Sales below cost are not a necessary element of such a case,

but there was some evidence from which the jury could have decided this question, too, against petitioner. (R. 64, 104-108) Atlas complains that Diamond's cost figures were not accurate, but it had no cost accounting system itself (R. 681) and its own data contained only a guess as to the overhead and sales costs (R. 769). Diamond did produce reasonably accurate cost data which did not certain non-recurring items which would not enter into calculating lost profits (R. 148, 149).

ARGUMENT

I

There Is No Irreconcilable Conflict with Decisions of the Seventh and Ninth Circuits on the Question of Whether, in a Price Discrimination Suit Between Competing Sellers, the Sales Must Have Been Made to Competing Purchasers, and the Point Is Unnecessary to Disposition of This Case

Atlas contends that the opinion of the Tenth Circuit in this case is in direct conflict with *Anheuser-Busch* v. *FTC*, 265 F.2d 677 (7th Cir. 1959), petition for certiorari filed September 9, 1959, Dkt. No. 389, and *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), cert. den. 350 U.S. 991, 76 S.Ct. 545, 100 L.Ed. 856 (1956), with regard to whether "the charging of different prices in different areas in sales to non-competing purchasers constitute[s] price discrimination," as Atlas states the issue (Pet. p. 10).

It is true that the Tenth Circuit disagreed with *Anheuser-Busch* and distinguished *Balian* on the facts, but both can be so distinguished and do not involve a point which is necessary to the determination of this case.

The Tenth Circuit's statement regarding these two cases is short enough to be set forth in full:

"Our case is also, we think, distinguishable on facts from Balian Ice Cream Co. v. Arden Farms Co., 9 Cir., 231 F.2d 356, in which, while the interstate manufacturer discriminated in price between different purchasers in distant localities, the difference in the price was held not to substantially lessen competition or tend to create a monopoly in the product sold. In short, the conclusive finding of the trial court negated the existence of any prohibited consequences or the possibility thereof.

The same legal issue was before the Seventh Circuit in Anheuser-Busch, Inc. v. Federal Trade Commission, 265 F.2d 677, where the court was presented with the basic question whether uniform local price cuts by an interstate manufacturer which disrupted the market to the injury of local competitors, were price discriminations within the proscription of Section 2(a). The court held that even though directed at local competitors, the price cuts were not discriminatory, apparently because they did not discriminate among local competitors. This conclusion is apparently based upon the theory contended for here that the statutory words 'different purchasers' means competing purchasers. We respectfully reject any such restriction upon Section 2(a). For, we are convinced that geographic price discriminations employed for predatory ends are cognizable under either Section 2(a) or Section 3, and it was therefore not error for the court to tell the jury that they might consider differences in price in El Paso County, Texas, and Dona Ana County, New Mexico, in determining whether the defendant was

guilty of actionable price discrimination." 269 F.2d at 955.

Although we must admire the Tenth Circuit's candor in disagreeing with *Anheuser-Busch*, the cases are so different on the facts and legal issues involved that the courts will have no difficulty in distinguishing them.

Atlas would have this Court believe that the only basis for Diamond's case is the discrimination in prices exacted from Las Cruces, New Mexico, customers as compared to those exacted from its customers in El Paso, Texas. Atlas also discriminated among its customers in Las Cruces. This is implicit in the Tenth Circuit's statement:

> "There was evidence that during the prosecution period, the appellant sold $162,000 worth of blocks in the Las Cruces area for prices in excess of 24.1¢, but the evidence also showed without much dispute that during the same period, it sold $603,163 worth of blocks at prices lower than 24.1¢ in the same area. From this it is reasonable to say, as did the jury, that the appellant discriminated in prices between its purchasers in El Paso and its purchasers of the same class in the Las Cruces area." 269 F.2d at 956.

The Tenth Circuit's attention was focused primarily on discrimination across the state line, but the Record shows that Atlas favored certain contractors and dealers in Las Cruces against their local competitors (R. 596-623, 627, 695-697). It also shows that, unlike *Anheuser-Busch* and *Balian*, this case involved adjacent and somewhat overlapping market areas. Atlas' general manager admitted (R. 730) that some El Paso dealers sold block in Las Cruces, for instance, and he conceded that to that extent

they were in competition with Las Cruces dealers. Also, some El Paso contractors bought Atlas block in El Paso for delivery in Las Cruces, where they were in direct competition with local contractors (R. 732).

Las Cruces, in Dona Ana County, New Mexico, is 45 miles from El Paso by U.S. Highways 80-85. Counsel for Atlas asked the Witness Van Alsburg the following questions, which elicited the answers shown:

> Q. And there is no question but that Otero County and Dona Ana County [both in New Mexico] are in the El Paso Market area?
>
> A. They are in the radius that has been sold to El Paso, which we call the marketing area.
>
> Q. And from your norms which you are talking about, they certainly fall into a norm for a marketing area, isn't that correct?
>
> A. That is correct. (R. 81)
>
> . . . . . .
>
> Q. So your estimate, you now tell us, is not based on the Las Cruces area, it is based on the Las Cruces plus the El Paso area; is that it?
>
> A. I set them separate, but they overlap. (R. 83).

No comparable situation existed in either *Anheuser-Busch* or *Balian*. In both of those cases the prices complained of were at least uniform within the market area involved, and there was no overlapping of market areas.

Anheuser-Busch is not a competing-sellers private suit but an FTC proceeding, wherein the FTC sought to keep Anheuser-Busch from selling beer in the St. Louis market area at prices lower than exacted by it in other, unspecified

market areas throughout the United States. The Seventh Circuit said,

> "There were many separate marketing areas for beer in the country. Each market had a distinct pattern of prices and the prices charged for the same beers varied among the different marketing areas." 265 F. 2d at 680.

In *Balian* the defendant, Arden, had ice cream manufacturing plants located in Los Angeles and Seattle and Balian contended Arden should charge the same prices in both areas, even though the two widely separated areas were served by different plants and the product was not shipped between the two areas. In Los Angeles, Arden had numerous competitors and had to contend with a chaotic pricing situation. Its competitors made so many "chiseling" cuts that Arden could not keep up with them, so Arden made a "blanket" cut in its Los Angeles prices. None of these facts fits the case at bar, where Atlas had only one real competitor (Diamond) in the area involved, admittedly paid no attention to Diamond's prices, supplied both areas (El Paso and Las Cruces) from the same plant, and initiated the price war itself.

In successfully opposing the petition for certiorari in *Balian*, Arden asserted at p. 20 of its brief that "Nowhere in the opinion is there a statement, either by inference or otherwise, that in order to establish price discrimination within the meaning of the Act there must be sales at different prices to purchasers who compete directly with each other," and that it is necessary to take statements out of context in order to arrive at any such conclusion. Atlas likewise has taken two statements out of context (two paragraphs apart) and pieced them together to make

them appear to be what they are not. The resulting patchwork follows:

> "'It is obvious that Arden, by selling ice cream products in the Los Angeles area at a lower price than it charged for like products in other states, did not violate Sec. 2(a) of the Clayton Act, as amended, 15 U.S.C.A. Sec. 13(a). * * * The customers of Arden in the respective areas are not in competition with each other, and the products sold in each area are sold in competition with like products manufactured by others.' 231 F. 2d at pp. 366-367." (Pet. p. 12)

The last sentence quoted, as stated by respondent Arden in its brief at p. 20, ". . . appears in a paragraph relating generally to the Court's findings . . ." In any event, it is a negative sort of statement, and the Ninth Circuit did not state it as a requirement. With Arden's counsel disclaiming any such holding in *Balian* as now urged by Atlas, the conflict contended for here appears unreal indeed.

Atlas also objects, irrelevantly, under this point that "The court below even failed to state whether the uniform price was supposed to be a uniform mill net return or a uniform delivered price." (Pet. p. 13) Since Atlas made no pretense of having a uniform mill net return or a uniform delivered price, no such issue was in the case. Also, having tendered no instructions on this matter and not having objected on these grounds to the instructions given, Atlas is in no position to complain. In any event, it is obvious that Atlas' prices were discriminatory on *any* basis. Its *delivered* price to some Las Cruces customers actually was lower than its *f.o.b. plant* price at El Paso!

Atlas complains that the court below failed to consider the asserted facts (again irrelevant to the point at hand) that Atlas made a "reasonable net profit" on all its Las

Cruces sales, and that Diamond made a profit every year (Pet. p. 13). Petitioner apparently believes that *Moore* v. *Mead's Fine Bread Co.*, 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed. 123 (1954) and *Porto Rican American Tobacco Co.* v. *American Tobacco Co.*, 30 F. 2d 893 (2nd 1929) hold that to be guilty of price discrimination a seller must sell below cost, must drive its competitor out of business or at least make him lose money, and must have a "predatory" intent in cutting prices. They do not, of course, but we do not feel it necessary to belabor these irrelevant matters under the point of whether there is a conflict in the circuits on the "competing purchasers" question.

However, *Moore* and *Porto Rican* certainly do support the Tenth Circuit's holding that there need not be direct competition between purchasers in a price discrimination suit between competing *sellers*. This matter was briefed and argued by both sides in *Moore* v. *Mead's Fine Bread Co., supra,* without evoking a specific holding on the point, but this Court necessarily considered it in reciting the facts and saying that they "read upon the words of the statute." 348 U.S. at 120, 75 S. Ct. at 150. That case is on all fours with this one. It was a suit between competing sellers, and the price cut was made to retail merchants in Santa Rosa, New Mexico, where the plaintiff had his bakery, while prices were kept high elsewhere, including Farwell, Texas, 114 miles distant. The Santa Rosa merchants were in no way in competition with those in Farwell, but the price to the latter furnished the high-price "leg" of the discrimination. This Court, after setting out the facts and the sections of the statue involved, said:

> "Those sections, on their face, seem to cover the instant case . . .
>
> "We think that the practices in the present case are also included within the scope of the anti-trust laws . . .

"This type of price cutting was held to be 'foreign to any legitimate commercial competition' even prior to the Robinson-Patman Act. See Porto Rican American Tobacco Co. of Porto Rico v. American Tobacco Co., 2 Cir., 30 F. 2d 234, 237. It seems plain to us that Congress went at least that far in the Robinson-Patman Act. As we have shown, the facts charged and found read upon the words of the statute. And the history of the Act shows it was designed to have the reach now claimed for it by petitioner." *Id.*, 348 U.S. at 118-120, 75 S. Ct. at 150, 151.

In the *Porto Rican* case, likewise between competing sellers, the prices compared for the purpose of establishing the discrimination were made to non-competing purchasers, "those of the United States and of Porto Rico." It is anachronistic that, 30 years after this Second Circuit decision and five years after this Court approved it in *Moore* v. *Mead's Fine Bread Co.*, there still should be any doubt that a seller may maintain an action under such circumstances.

The Tenth Circuit undoubtedly is correct on this matter. Whatever disposition this Court may make of the petition for certiorari now pending in Anheuser-Busch, no useful purpose would be served by granting the petition in this case. The real conflict is between *Anheuser-Busch* and *Moore* v. *Mead's Fine Bread Co., supra.* It is unnecessary to disturb the Tenth Circuit's decision in order to correct the Seventh Circuit's interpretation of the applicable decisions of this Court.

II

"Reasonable Possibility" Is the Correct Measure of the Effects Proscribed by § 2(a) of the Amended Clayton Act Under the Decisions of This Court, and the Circuits Are in Agreement

Atlas contends that the Tenth Circuit erred in approving the trial court's use of the term "reasonable possibility" in instructing the jury as to what constitutes the harmful effect on competition proscribed by § 2(a) of the amended Clayton Act, 15 U.S.C.A. § 13(a), 49 Stat. 1526. Although admitting that this Court has employed the "reasonable possibility" test, Atlas claims it "inadvertently switched" from the "reasonable probability" terminology it formerly used and that four circuits and the Federal Trade Commission have refused to follow this switch.

We deny the existence of any such inadvertence or conflict. The "reasonable possibility" rule laid down in *Corn Products Refining Co.* v. *FTC*, 324 U.S. 726, 65 S.Ct. 961, 89 L.Ed. 1320 (1945) was reiterated in *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 68 S.Ct. 822, 92 L.Ed. 1196 (1948) and was emphasized by the dissent in the latter case, thus negativing any inadvertence.

The cases in which Atlas claims to discern a conflict are: *Minneapolis-Honeywell Reg. Co.* v. *Federal Trade Commission*, 191 F.2d 786, 792 (7th Cir. 1951), cert. dismissed, 344 U.S. 206, 73 S.Ct. 245, 97 L.Ed. 245 (1952); *Whitaker Cable Corporation* v. *FTC*, 239 F.2d 253 (7th Cir. 1956); *E. Edelmann & Co.* v. *FTC*, 239 F.2d 152, 154 (7th cir. 1956); *Moog Industries, Inc.* v. *FTC*, 238 F.2d 43, 51 (8th Cir. 1956), affirmed, 355 U.S. 411, 78 S.Ct. 377, 2 L.Ed. 2d 370 (1958); *Balian Ice Cream Co.* v. *Arden Farms Co.*, 231 F.2d 356, 368 (9th Cir. 1955), cert. denied, 350 U.S. 991, 76

S.Ct. 545, 100 L.Ed. 856 (1956); *Standard Motor Products, Inc.* v. *FTC*, 265 F.2d 674, 676 (2nd Cir. 1959).

Atlas then cities the FTC policy statement, CCH Trade Reg. Reports, ¶ 3601.35, which gives a clue to the use of "reasonable probability" in some of the FTC cases. It is clear that the FTC approaches this matter from the point of view of "public interest" rather than that of the individual competitor who may be victimized. There is, of course, nothing to keep the FTC from applying a higher standard of proof of "effect" in its proceedings than the minimum this Court has said is necessary. For the same reason, it confines itself largely to those cases in which there is a greater likelihood of substantial injury to competition generally. Sometimes, as in *Edelmann*, it makes findings of *both* reasonable possibility and reasonable probability of the proscribed effect. The courts in reviewing FTC orders have a tendency to employ the higher standard which the FTC has imposed on itself, but only where they affirm the orders, *e.g.*, *Edelmann*, *Moog Industries*, *Whitaker Cable* and *Standard Motor Products*. In *National Lead Co.* v. *FTC*, 227 F.2d 825, (7th Cir. 1955) rev'd on other grounds, 352 U.S. 419, 77 S.Ct. 502, 1 L.Ed. 2d 438 (1957), not cited by Atlas, the Seventh Circuit made it clear that, although the Commission found a reasonable *probability* to exist, a reasonable *possibility* was all that was required under *Corn Products* and *Morton Salt*. In *Standard Motor Products* the Second Circuit made it equally clear that the facts there afforded more than the "bare minimum prima facie case" held sufficient in *Morton Salt* and *Samuel H. Moss, Inc.* v. *FTC*, 148 F.2d 378 (2nd Cir. 1945), cert. den. 326 U.S. 734, 66 S.Ct. 44, 90 L.Ed. 438 (1945). *Minneapolis-Honeywell* is in perfect harmony with *Corn Products* and *Morton Salt*, as well as with later

Seventh Circuit cases, for it simply says that a *mere* possibility is not a *reasonable* possibility.

Balian, the only non-FTC case cited by Atlas as supporting a test of "reasonable probability," in effect holds the opposite, saying,

> "The findings of the trial court expressly negativing the existence of any such consequences or a *possibility* of such results were supported by substantial evidence." 231 F.2d at 368 (Emphasis supplied).

Thus no conflict exists in the circuits on this point, and no circuit has contravened the doctrine laid down by this Court. As far as a jury is concerned, the difference between "reasonable posssibility" and "reasonable probability" no doubt is very slight, and it disappears entirely where, as here, the victimized competitor has suffered *actual* damage. Respondent tendered an instruction that such actual effect meets the requirements of the Act (No. 22, R. 837), and it would have obviated any instruction on "reasonable possibility" of effect. Thus even the "reasonable possibility" instruction was more favorable to Atlas than it deserved.

III

Pinpoint Accuracy in Tracing Damages to Acts Complained of Is Not Required, and There Is No Conflict on This Point

As a vehicle to bring up the sufficiency of the facts to sustain the verdict, Atlas again seeks to employ an imaginary conflict in the circuits, contending that the decision here conflicts with *Momand* v. *Universal Film Exchanges, Inc.*, 172 F.2d 37 (1st Cir. 1948), cert. den. 336 U.S. 967, 69 S.Ct. 939, 93 L.Ed. 1118 (1949); *American Can Co.* v. *Russellville Canning Co.*, 191 F.2d 38 (8th Cir.

1951); and *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368 (9th Cir. 1957), cert. den. 355 U.S. 835, 78 S.Ct. 54, 2 L.Ed. 2d 46 (1957).

These cases, Atlas asserts, hold that "where there are a number of causes for loss and the plaintiff is unable to pinpoint the cause of all or any ascertainable part of his losses as being caused by the defendant's illegal activities, a verdict for plaintiff cannot stand." (Pet. p. 17) None of these cases makes such a sweeping statement. Each can be distinguished readily on the facts, but to do so would take much more time and space than warranted. In any event, petitioner has not made such an analysis.

The facts are well summarized by the court below at 269 F. 2d 955 and 956. Perhaps the most significant of these facts is that about four-fifths of Atlas' sales in Las Cruces were at prices which were discriminatory as compared to its El Paso prices, and lower than Diamond's. With its lower prices Atlas took a number of customers from Diamond, including the two principal home builders in the area. In view of this and other evidence, the trial judge said the jury's $10,000 award was "very moderate," and the Tenth Circuit agreed. 269 F. 2d at 959.

Although Atlas during the trial threw up quite a smoke-screen of other possible causes of Diamond's losses, and though this undoubtedly had a moderating effect on the verdict, there still was plenty of evidence of damages directly traceable to Atlas' acts to support the verdict. The standard defense tactic in such cases is to paint the plaintiff as completely inept, inefficient, and foredoomed to failure. If appellate courts were to upset every jury verdict where there was evidence of this sort, simply on the ground that the plaintiff did not trace his damages to the acts of the defendant with "pinpoint" accuracy, private actions for treble damages under the anti-trust laws would be completely hopeless. They are difficult enough as it is.

This Court has stated the applicable rule in such cases in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 556, 51 S. Ct. 248, 251, 252, 75 L. Ed. 544 (1931):

> "Disposing of the second item of damages, the court below, after referring to evidence tending to show that petitioner was not in a thriving financial condition, said that petitioner was without capital to meet the situation which it faced, even if there had been no conspiracy and there had been open competition; and that its failure was inevitable either from lack of capital or inefficient management or both. The court therefore concluded that petitioner had not sustained the burden of proving that the depreciation in value of its plant was due in any measurable degree to any violation of the Sherman Act by the respondents. But this conclusion rested upon inferences from facts within the exclusive province of the jury, and which could not be drawn by the court contrary to the verdict of the jury without usurping the functions of that fact-finding body. Whether the lawful acts of respondents or conditions apart from them constituted the proximate cause of the depreciation in value was a question, upon the evidence in this record, for the jury, 'to be determined as a fact, in view of the circumstances of fact attending it.' Milwaukee, etc., Railway Co. v. Kellogg, 94 U.S. 469, 474, 24 L. Ed. 256. And the finding of the jury upon that question must be allowed to stand, unless all reasonable men, exercising an unprejudiced judgment, would draw an opposite conclusion from the facts."

Atlas also cites *Story Parchment*, quoting a portion of one sentence which might seem to support its position.

It is placed back in context below, with the portion quoted by Atlas italicized:

"Upon a consideration of the evidence, we are of opinion that it was open to the jury to find that the price cutting and the resulting lower prices were directly attributable to the unlawful combination; and that the assumption indulged by the court below, that respondents' acts would have been the same if they had been acting independently of one another, with the same resulting curtailment of prices, must be rejected as unsound.

"Nor can we accept the view of that court that the verdict of the jury, in so far as it included damages for the first item, cannot stand because it was based upon mere speculation and conjecture. This characterization of the basis for the verdict is unwarranted. It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage and the measure of proof necessary to enable the jury to fix the amount. *The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong*, not to those damages, which are definitely attributable to the wrong and only uncertain in respect of their amount." • • •

"Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts. In such case, while the damages may not be determined by mere speculation

or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise. Eastman Co. v. Southern Photo Co., 273 U.S. 359, 379, 47 S. Ct. 400, 71 L. Ed. 684." 282 U.S. at 562, 51 S. Ct. at 250, 251.

Indeed, in *Bigelow* v. *R.K.O. Pictures, Inc.*, 327 U.S. 251, 264, 66 S. Ct. 574, 579, 90 L. Ed. 652 (1946), this Court held that the plaintiff in such a case can recover damages "not shown to be attributable to other causes" than the defendant's wrongful acts. This burden of proof has not been met by Atlas. Extensive quotations could be made from the *Bigelow* and *Eastman Kodak* cases, also, but they will be omitted since *Story Parchment* covers the point so well.

IV

This Case Creates No Conflict with Other Circuits on Computation of Damages

As we understand Atlas' fourth reason for granting certiorari, it is contended that Diamond failed to produce *any* evidence as to the amount of its damages and that in sustaining the judgment of the trial court the Tenth Circuit created a conflict with these decisions: *Baush Machine Tool Co.* v. *Aluminum Company of America*, 79 F.2d 217 (2nd Cir. 1935); *Enterprise Industries* v. *Texas Company*, 240 F. 2d 457, 458-459 (2nd Cir. 1957), cert. denied, 353 U.S. 965, 77 S. Ct. 1049, 1 L. Ed. 2d 914 (1957); *Emich Motors Corp.* v. *General Motors Corp.*, 181 F. 2d 70 (7th

Cir. 1950), reversed on other grounds, 340 U.S. 558, 71 S. Ct. 408, 95 L. Ed. 534 (1951); *Fargo Glass & Paint Co.* v. *Globe American Corp.*, 201 F. 2d 534, 540-541 (7th Cir. 1953); *Wolfe* v. *National Lead Company*, 225 F. 2d 427 (9th Cir. 1955), cert. denied, 350 U.S. 915, 76 S. Ct. 135, 100 L. Ed. 802 (1955).

Petitioner has not pointed out wherein these cases conflict with the decision of the Tenth Circuit, but they are cited by Atlas for the proposition that "the jury must have figures with which reasonably to compute the amount of damages" (Pet. p. 19) It is difficult to come to grips with such generalities. Apparently Atlas contends that damages in such cases should be capable of exact computation, a concept which this Court has long since laid to rest in *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, *Bigelow* v. *R.K.O. Pictures, Inc.*, and *Eastman Kodak Co.* v. *Southern Photo Co.*, discussed under the preceding point.

The bald statement that Diamond failed to produce any evidence as to the amount of damages might be met with an equally flat denial. However, we respectfully refer the Court to the Tenth Circuit's opinion, 269 F. 2d at 958, for a partial summary of such evidence, and also to the objections to petitioner's statement of the facts.

V

Section 2(a) of the Amended Clayton Act Is Not So Vague, Uncertain and Indefinite as to Be Unconstitutional

This is a case of first impression on this point. Never before in all the 45 years since the enactment of the original Clayton Act, nor in the 23 years since its amendment by the Robinson-Patman Act, has anyone had the temerity to attack either the original § 2 or the present § 2(a) on

grounds of unconstitutionality. No doubt others have been deterred by *Nash* v. *United States*, 229 U.S. 373, 33 S. Ct. 780, 57 L. Ed. 1232 (1913), where this Court upheld the much broader Sherman Act against a similar assault.

It is submitted that the Sherman Act is, or was in the beginning, much more vague and uncertain in meaning than the Robinson-Patman Act. In addition, the former carries penal provisions which the latter does not, and the courts apply stricter standards of certainty to criminal or penal statutes. Atlas construes the treble damage feature of the Clayton Act's § 4, 15, U.S.C.A. § 38 Stat. 731, as making it a penal statute, but cites no authority. This is a false premise. *Elizabeth Arden Sales Co.* v. *Gus Blass Co.*, 150 F. 2d 988, 992 (8th Cir. 1945), cert. den. 326 U.S. 773, 66 S. Ct. 231, 90 L. Ed. 467, (1945).

Other sections of the Clayton Act, as amended by the Robinson-Patman Act, have survived constitutional attacks. These include §§ 2(c), 2(e), and 3; 15 U.S.C.A., §§ 13(c), 13(e) and 14. Upholding § 2(c) are *Biddle Purchasing Co.* v. *FTC*, 96 F. 2d 687 (2nd Cir. 1938), cert. den. 305 U.S. 634, 59 S. Ct. 101, 83 L. Ed. 407 (1938); *Oliver Bros.* v. *FTC*, 102 F. 2d 763 (4th Cir. 1939); *Great Atlantic & Pacific Tea Co.* v. *FTC*, 106 F. 2d 667 (3rd Cir. 1939), cert. den. 308 U. S. 625, 60 S. Ct. 380, 84 L. Ed 531 (1940); and *Webb-Crawford Co.*, v. *FTC*, 109 F. 2d 268 (5th Cir. 1940), cert. den. 310 U.S. 638, 60 S. Ct. 1080, 84 L. Ed. 1406 (1940). Section 2(e) was upheld in *Elizabeth Arden Sales Corp.* v. *Gus Blass Co.*, *supra*; and *Elizabeth Arden, Inc.* v. *FTC*, 156 F. 2d 132 (2nd Cir. 1946); cert. den. 331 U.S. 806, 67 S. Ct. 1189, 91 L. Ed. 1828 (1947). Section 3 was held valid by this Court in *United Shoe Machinery Co.* v. *United States*, 258 U.S. 451, 42 S. Ct. 363, 66 L. Ed. 708 (1922). Likewise, § 3 of the Robinson-Patman Act, 15 U.S.C.A. § 13a, though not a part of the amended Clayton

Act, has been held constitutional in *F. & A. Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180 (D.C.S.D. Cal., C.D., 1951). *Cf., U.S. v. Bowman Dairy Co.*, 89 F. Supp. 112 (D.C.N.D. Ill. 1949).

It is submited that § 2(a) is at least as definite and certain as these other sections of the Clayton and Robinson-Patman acts.

It is much too late, of course, to contend seriously that § 2(a) of the amended Clayton Act violates the Fifth Amendment Too many cases have been litigated under it at all levels of the Federal courts. We feel sure that if there were any doubt about it this Court would have raised this jurisdictional question *sua sponte* in such cases as *Moore v. Mead's Fine Bread Co., supra*, and *Safeway Stores v. Vance*, 355 U.S. 389, 78 S. Ct. 358, 2 L. Ed. 2d 352 (1958).

Conclusion

We submit that petitioner has failed to state any special or important reasons why a writ of certiorari should be granted in this case. Accordingly, the petition should be denied.

Respectfully submitted,

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